

**ORIGINAL**

**FILED**

June 8 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No.

IN THE MATTER OF:

M.C.B.,

A Youth in Need of Care

**FILED**

JUN - 8 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

**PETITION FOR OUT-OF-TIME APPEAL**

The Office of the State Public Defender requests that the Court permit an out-of-time appeal for this case under Mont. R. App. P. 4(6), which provides:

In the infrequent harsh case and under extraordinary circumstances amounting to a gross miscarriage of justice, the supreme court may grant an out-of-time appeal. An out-of-time appeal must be requested by verified petition supported by affidavits, records, and other evidence establishing the existence of the extraordinary circumstances claimed. Extraordinary circumstances do not include mere mistake, inadvertence, or excusable neglect.

The basis for the request is as follows:

T.B. and L.B. were the respondents in a proceeding to terminate their parental rights to their son, M.C.B. The termination hearing was held March 1 and 2, 2010. A Notice of Entry of Judgment, terminating T.B. and L.B.'s parental rights, was filed April 28, 2010.

Upon receipt of the Notice of Entry of Judgment, filed April 28, 2010, the undersigned counsel of record for the parent-respondents, T.B. and L.B., contacted T.B. and L.B. to discuss their appellate options. Both clients indicated, as they had

in the past, that they wished to appeal. The undersigned advised them to meet the following week to go over the findings of fact and conclusions of law. The respondents rescheduled the appointment once and did not appear for the rescheduled appointment. Nevertheless, counsel was aware of their unambiguous desire to appeal. Counsel erroneously believed, however, that the deadline for appeal was sixty days, and became busy with a trial in the middle of May 2010. The undersigned did not consult the statute or court rules to clarify the appeal deadline. This error came to light on June 4, 2010, when counsel was contacted by the CASA advocate, who advised he believed the time for appeal had run. The time for filing an appeal had in fact run on May 28, 2010.

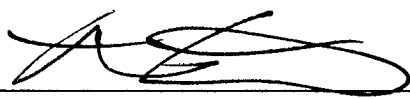
Undersigned counsel respectfully requests leave to file the respondents' notice of appeal by no later than June 9, 2010. The untimely notice of appeal was due to an error by counsel that was not due to the fault of either respondent, who had indicated their desire to appeal. The respondents are constitutionally entitled to effective assistance of counsel. *See In re J.J.L.*, 2010 MT 4, ¶ 16, 355 Mont. 23, 223 P.3d 921. Denying them the right to pursue an out-of-time appeal may well deny them that right.

To guarantee the respondents' constitutional rights have been protected with regard to the termination of their parental rights, OPD requests an order permitting it to file an out-of-time appeal for T.B. and L.B. Failure to allow the respondents

to pursue their appeal will result in a gross miscarriage of justice given the constitutional rights at stake for them.

Respectfully submitted this 8<sup>th</sup> day of June, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER  
139 N. Last Chance Gulch  
P.O. Box 200145  
Helena, MT 59620-0145

By:   
CHRISTOPHER D. ABBOTT  
Assistant Public Defender  
Attorney for Respondent T.B.

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing  
Petition for Out-of-Time Appeal to be mailed to:

NANCY SWEENEY  
Clerk of the District Court  
Lewis and Clark County Courthouse  
228 Broadway  
Helena, MT 59601

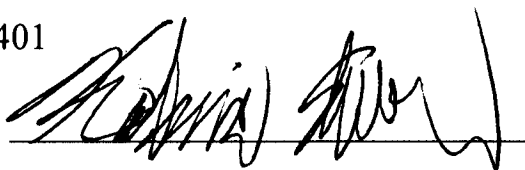
TARA HARRIS  
Deputy Lewis and Clark County Attorney  
Lewis and Clark County Courthouse  
228 Broadway  
Helena, MT 59601

Copy mailed to T.B.

STEVE BULLOCK  
Montana Attorney General  
MARK MATTIOLI  
Assistant Attorney General  
215 North Sanders  
Helena, MT 59620-1401

DATED: \_\_\_\_\_

6/8/10

A handwritten signature in black ink, appearing to read "Mark Mattioli", is written over a horizontal line.

STATE OF MONTANA            )  
  : ss.

County of Lewis and Clark    )

I, Christopher D. Abbott, being first duly sworn upon my oath, depose and state as follows:

1.     I am employed as an Assistant Public Defender with the Office of the State Public Defender.

2.     I represent T.B. and L.B., the birth parents of M.C.B. and the respondents in *In re M.C.B.*, District Court Cause No. CDN 2008-39.

3.     On April 28, 2010, Notice of Entry of Judgment was filed. The district court had entered an order terminating T.B. and L.B.'s parental rights to M.C.B.

4.     Upon receiving the Notice of Entry of Judgment, I contacted T.B. and L.B. by telephone on April 30, 2010, to discuss the district court's order and their appellate options. We agreed to set up an appointment for May 4, 2010, to discuss options, but T.B. and L.B. called and rescheduled for May 7, 2010. They did not appear for the May 7, 2010, appointment.

5.     Nevertheless, both prior to receipt of the order terminating parental rights and during the April 30, 2010, phone conversation, the respondents indicated to me their desire to appeal the termination order.

6. Through my own fault, I mistakenly believed the deadline for a DN appeal was sixty days, not thirty days. I did not consult the rules or statutes to confirm that assumption.

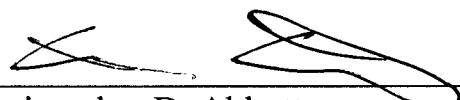
7. I did not file a notice of appeal within the thirty-day deadline for doing so.

8. I realized my error when I was contacted by the CASA advocate on June 4, 2010, who stated that he believed the appeal deadline had run. When I checked, I realized the appeal deadline was actually thirty days.

9. I promptly contacted the appellate defender's office to initiate the process for filing an out-of-time appeal.

10. I contacted Assistant Attorney General Mark Mattioli regarding the State's position on this petition but have not received a response.

Further affiant sayeth naught.

  
\_\_\_\_\_  
Christopher D. Abbott

SUBSCRIBED AND SWORN to before me this 8<sup>th</sup> day of  
June, 2010.

  
\_\_\_\_\_  
KATRINA SHERMAN

